89-399

NO. ___

IN THE

Supreme Court Of The United States

October Term, 1989

GEORGE KRUPA,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

On Appeal from the Court of
Criminal Appeals of Texas

PETITION FOR WRIT CERTIORARI

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QUESTION PRESENTED

Did the trial Court err in failing to grant Petitioner's Motion for Directed Verdict because the evidence was insufficient to show that Mildred Hewitt Krupa had a greater right to possession of the property in question than did Petitioner, in that the evidence established that the property was Petitioner's homestead, thus rendering a decision in conflict with decisions of the U. S. Supreme Court?

LIST OF PARTIES

The caption of this case contains the names of all parties.

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OPINIONS DELIVERED IN THE COURTS BELOW

Petitioner appealed from a conviction for Criminal Mischief Over $750 and Less Than $20,000 for which Petitioner was charged by Indictment. Punishment was assessed at five (5) years confinement, probated five (5) years. This conviction was affirmed by the Court of Appeals for the Fifth Supreme Judicial District Sitting at Dallas, Dallas County, Texas on March 30, 1988 and was reported at 750 SW2d 258. A Motion for Extension of Time to File a Motion for Rehearing was filed on April 14, 1988 and was granted authorizing the filing of the Motion for Rehearing by April 28, 1988. On April 28, 1988, Petitioner filed his Motion for Rehearing which was overruled by the Court of Appeals on May 24, 1988.

On June 24, 1988, Petitioner filed his Petition for Discretionary Review which was denied on April 26, 1989. Petitioner timely filed his Motion for Rehearing which Motion was denied on the

7th day of June, 1989. Petitioner now files his Petition praying that the Court grant his Writ of Certiorari.

The Opinion of the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas is annexed as Appendix "A" and is reported in the Southwest Reporter 750 SW2d 258. The Court of Civil Appeals Order granting an extension of time for the filing of a Motion for Rehearing and its Order overruling Petitioner's Motion for Rehearing are annexed as Appendices "B" and "C" respectively and the Court of Criminal Appeals for the State of Texas Order granting an extension of time within which to file Petitioner's Petition for Discretionary Review is annexed as Appendix "D". The Court of Criminal Appeals Opinion on Petitioner's Petition for Discretionary Review, which review would have been granted by two Justices, is annexed as Appendix "E" and the Court of Criminal Appeals Opinion on Petitioner's Motion for Rehearing which one Justice would have granted is annexed as Appendix "F".

JURISDICTIONAL STATEMENT

In affirming Petitioner's conviction, the Court of Appeals for the Fifth Supreme Judicial District Sitting at Dallas, Texas failed to recognize the applicability of a decision of this Court which application would have required the Court of Appeals to reverse and render. The jurisdiction of this Court is conferred by 28 USC 1254(1).

The Judgment of the trial Court was entered on February 17, 1987 and is annexed as Appendix "G". The various Orders related to Motions for Extension of Time, Motions for Rehearing and Petition for Discretionary Review are cited above under Opinions Delivered Below, copies of the Orders or Opinions being annexed as Appendices, with the last Order being issued by the Court of Criminal Appeals on Petitioner's Motion for Rehearing, which Motion was denied and entered on June 7, 1989.

CONSTITUTIONAL PROVISIONS INVOLVED

TEX.CONST.art.XVI, §50, §51, and §52 which provide:

§50: "The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the working material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefore, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void. This amendment shall become effective upon its adoption."

§51: "The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or lots amounting to not more than one acre of land, together with any improvements on the land; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not

change the character of the same, when no other homestead has been acquired."

§52: "On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same."

STATUTORY PROVISIONS INVOLVED

TEX.PROP.CODE, Title 5, §41.001 Homestead:

A. "To be a homestead property must be used by a homestead claimant as a home or a place to exercise the calling or business to provide for a family or single adult who is not a member of a family. The homestead consists of: (1) one or more parcels of real property, including improvements, that is not in a city, town, or village and that totals not more than two hundred acres for a family or not more than one hundred acres for a single adult who is not a member of a family; or (2) one or more lots in a city, town, or village, amounting to not more than one acre of land, together with any improvements on the land."

B. "Temporary renting of a homestead does not change its homestead character if the homestead claimant has not acquired another homestead."

C. "The exemptions provided to homesteads under this section apply to all homesteads in this state regardless of the date they were created."

TEX.PENAL CODE ANN.§1.07(24):

> "Owner" means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor.

STATEMENT OF THE CASE

The Indictment alleged that Petitioner committed criminal mischief to property owned by the Complainant, Mildred Hewitt Krupa, she having ownership by virtue of having a greater right to possession of the property than Petitioner. (TR. 35-38) The manner of ownership alleged is one of three types of ownership provided in TEX.PENAL CODE ANN.§1.07(24) The evidence submitted at trial revealed that the property, a house trailer, had been purchased in 1978. At that time, the Complainant was married to a Slim Williams but was later divorced and, pursuant to the divorce, Complainant was awarded the trailer but had to pay Mr. Williams one-half interest in it. (S.F. 24/5-25) Petitioner and Complainant were married, the first marriage commencing February 13, 1984 and ending in divorce March 25, 1984. The second marriage between Petitioner and Complainant began November 26, 1984 and again ending in divorce on March 26, 1985. (S.F. 7/24-25, 8/1-10) At the times Petitioner and Complainant were married, Complainant was making monthly payments to Williams for his interest and these payments were made out of the only bank account which she had which was with Grayson Bank. (S.F. 23/20, S.F. 24/23-25, S.F. 25/6-9, S.F. 137/4-15) The trailer was located north of Pottsboro at Route 2, Box F-453 in Ridgecrest Addition (S.F. 11/8-12 and S.F. 27/10-13) and at all times during both marriages between Petitioner and Complainant, the parties lived at this address, did not live anywhere else, looked upon this place as their home, and neither abandoned the trailer as home during the marriage. (S.F. 27/23-25, S.F. 28/1-10, S.F. 29/21-25 and S.F. 30/1-3) Petitioner left the house for the last time when he was taken to jail after commission of the offense.

As such, the evidence in this case established that the house trailer was the homestead of Petitioner at the time of the commis-

sion of the offense. The United States Supreme Court in construing the Texas Constitution, has held that neither spouse has a greater possessory interest in the homestead and that neither can be divested of his possessory interests except certain conditions exist or occur. The evidence in this case is unrefuted that none of those limited conditions existed or occurred at the time of the offense. Notwithstanding the fact that the State had to prove greater right to possession and failed to do so in light of the decisions of this Court, the trial Court refused to grant Petitioner's Motion for Directed Verdict.

Petitioner presented his Motion for Directed Verdict to the Court and the Court's ruling on it can be found at S.F. 129/5-25 and S.F. 130/1-12) Petitioner again raised the question addressed here in the Court of Civil Appeals and the Court of Criminal Appeals by contending that the trial Court erred in failing to grant Petitioner's Motion for Directed Verdict because the evidence was insufficient to show that Mildred Hewitt Krupa had a greater right to possession of the property in question than did Petitioner. See page 11 and 12 of the Court of Civil Appeals Opinion annexed hereto as Appendix "A".

ARGUMENT

The evidence presented in Petitioner's case unrefutably established the trailer as Petitioner's homestead. By virtue of this evidence, Petitioner established an undivided possessory interest in and to the trailer which as determined by the U. S. Supreme Court in *United States v. Lucille Mitzi Bosco Rodgers, et al*, 461 US 677, 76 LEd2d 236, 103 Sup.Ct. 2132 (1983) is lost only by death or abandonment. Since Petitioner and his wife, Mildred Hewitt Krupa, had an undivided possessory interest in the trailer, neither had a greater right to possession than the other. The State alleged that Mildred Hewitt Krupa had a greater right to possession of the trailer as opposed to Petitioner and it is this essential element of the State's case that is the focal point of Petitioner's defense.

The Court of Civil Appeals in this case cited *Blevins v. State*, 672 SW2d 828 (Tx.App. [13th Dist.]. 1984) wherein Blevins was accused by complainant of killing a deer in closed season. The

complaint, however, alleged that Blevins killed a white-tail deer and no evidence was submitted at trial that Blevins killed a white-tail deer. Just as in *Blevins*, Petitioner's conviction cannot stand unless there was evidence submitted upon which a jury could have found that Mildred Hewitt Krupa had a greater right of possession. The undisputed evidence in this case established Petitioner's homestead interest in the trailer. Notwithstanding the clarity of the *Rodgers* opinion wherein the Supreme Court specifically held that the effect of the provisions of the Texas Constitution pertaining to homestead is to give "each spouse in a marriage a separate and undivided possessory interest in the homestead which is only lost by death or abandonment, ...". The lower Courts in this case now claim there exists additional ways one may be divested of his possessory homestead interests. "As the Supreme Court of Texas has put it, a spouse has a vested estate in the land of which she cannot be divested during her life except by abandonment or voluntary conveyance in the manner prescribed by law." See also *Paddock v. Siemoneit*, 218 SW2d 428 (Tx.Sup.Ct. - 1949)

Neither of the conditions which result in the loss of the homestead possessory interest existed in the instant case. Petitioner was certainly not dead nor did an abandonment occur. Abandonment of a homestead requires both a cessation or discontinuance of use of the property as a homestead coupled with the intent to permanently abandon the homestead. *Franklin v. Woods*, 598 SW2d 946 (Tx.Civ. App. - Corpus Christi, 1980)

The Texas Court of Civil Appeals side steps the significance of Petitioner's possessory homestead interest by applying the holding in *Freeman v. State*, 707 SW2d 597 (Tx.Crim.App. - 1986) and finding that since Petitioner threatened to burn the trailer, he forfeited whatever possessory interest he had in it. Notwithstanding the fact that such an application of *Freeman* in the instant case would wash any meaning out of the *Rodgers* opinion, the distinction between *Freeman* and Petitioner's case vastly outweigh any similarities. *Freeman* relied on an employer/employee relationship as the source of Freeman's possessory interest. Freeman's employer defined the breadth and scope of the possessory interest. Presumably, Freeman had no possessory interest until she commenced to perform her duties as an employee and her possessory

interest ceased when she ceased to perform within the course and scope of her employment. In reality, Freeman did not forfeit her possessory interest when she engaged in conduct inconsistent with her duties as an employee because she had no possessory interest at that time. In fact, the *Freeman* court arrived at its decision by recognizing Freeman as a fiduciary and holding that when a fiduciary decides, for whatever reason, to unlawful and permanently deprive the lawful owner of property, he is then acting in an unauthorized capacity i.e. he is then exercising unauthorized control over property and at such moment has breached the trust the employer has placed in him and has in turn committed the offense of theft. It is clear thereby that Freeman's possessory interest was extremely limited.

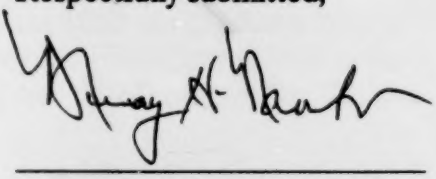
In the instant case, Petitioner's possessory interest spring from the husband and wife relationship within the scope of the Texas Homestead Law TEX.PROP.CODE, Title 5 and TEX.CONST.art.XVI, §50, §51, and §52. Such possessory interest and the limited conditions in which the possessory interest may be lost have been determined by the Texas Supreme Court and U. S. Supreme Court. See *Gonzalez v. Gonzalez*, 273 SW 798 (Tx.Sup.Ct. - 1925) and *United States v. Rodgers*, supra No evidence was presented in this case from which the jury could deduce that either of those limited conditions as recognized by the Texas and United States Supreme Courts existed.

The Judgment of the trial Court, Texas Court of Appeals and Court of Criminal Appeals departs from the decision of this Court which specifies the breadth and scope of one's possessory homestead interest pursuant to Texas law. As such, Petitioner's Petition for Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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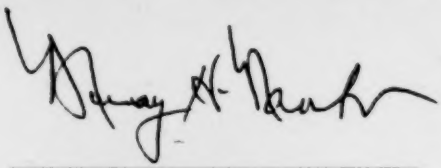
(214) 892-9152

CERTIFICATE OF SERVICE

This is to certify that Petitioner has asked Balmar Printing and Graphics, Inc. to prepare and file Petitioner's Petition for Certiorari and that a true and correct copy of the above and foregoing has been sent via certified mail, return receipt requested, to the County Attorney, Grayson County Justice Center, 200 S. Crockett, Sherman, Texas 75090 on this the 7th day of September, 1989.



Murray H. Nance, Jr.

Appendix A

Court Of Appeals
Fifth District Of Texas
At Dallas

NO. 05-87-00419-CR

GEORGE KRUPA, APPELLANT,
V.
THE STATE OF TEXAS, APPELLEE,

FROM A DISTRICT COURT OF GRAYSON COUNTY, TEXAS

BEFORE JUSTICES DEVANY, LAGARDE AND THOMAS
OPINION BY JUSTICE LAGARDE
MARCH 30, 1988

Appellant, George Krupa, appeals from a conviction of criminal mischief. Krupa was convicted by a jury and sentenced by the court to five years' confinement, probated for five years. Krupa raises four points of error. For the reasons set out below, we affirm the judgment of the trial court.

Krupa and complainant, Mildred Hewitt Krupa (hereinafter "complainant"), were married and living together in the trailer damaged by Krupa at all times relevant to this case. On the evening of January 25, 1985, Krupa and complainant had an argument. As the conflict became more volatile, complainant told Krupa of her intention to call the Grayson County Sheriff. Krupa responded that if she did call the sheriff, he would burn the trailer. Complainant then left the trailer and called the sheriff's office. Complainant explained the situation to an employee of the Grayson County Sheriff's Department and two deputies agreed to go with her to the trailer house and wait there while she went in to get some of her belongings. When the two deputies and the

complainant arrived at the trailer, they found the door to the trailer tied shut with a cord. Upon gaining entry, the three witnesses saw Krupa pour kerosene about the trailer and start a fire. The trailer and most of its contents were badly damaged.

In his first point of error, Krupa argues that the trial court erred in failing to submit his requested instruction regarding homestead law to the jury. Krupa requested that the trial court give the following instruction:

> You are instructed that homestead is a dwelling house constituting the family residence, together with the land on which it is situated and appurtenances connected therewith. Occupancy and use of the property by the head of the family impresses upon the property a homestead.
>
> The husband has a homestead interest in the wife's land so long as it is devoted to homestead usage, including the right to continue in possession and enjoyment thereof as homestead until abandonment, conveyance by both husband and wife, or divorce.
>
> Both husband and wife have an equal right to possession of the homestead.
>
> Therefore, if you find from the evidence beyond a reasonable doubt that on or about January 25, 1985, in the County of Grayson and the State of Texas, George Krupa, hereinafter called "Defendant" did then and there intentionally damage and destroy, by putting a flammable liquid on said trailer and igniting said flammable liquid by a means unknown, tangible property, to-wit: a trailer, without the effective consent of Mildred Hewitt Krupa, and did thereby cause pecuniary loss in the amount of more than $20,000.00 to the said Mildred Hewitt Krupa, against the peace and dignity of the State, but you further find that the property allegedly damaged, to-wit: a trailer, was the homestead of George Krupa and Mildred Hewitt Krupa at the time that the alleged offense occurred, you will acquit the defendant and say by your verdict, "not guilty."

The State argues that the refusal of the trial court to submit the instruction as set out above was not error because Krupa's interest in the property was irrelevant to the prosecution of this case. The State relies on section 28.05 of the Texas Penal Code which states:

> It is no defense to prosecution under this chapter that the actor has an interest in the property damaged or destroyed if another person also has an interest that the actor is not entitled to infringe.[1]

Section 28.05 is not applicable to the unique indictment and facts of this case. Krupa was charged under section 28.03 of the Texas Penal Code. Section 28.03 states:

> A person commits an offense if, without the effective consent of the owner: ...he intentionally or knowingly damages or destroys the tangible property of the owner.[2]

Under this statute, the State must prove, as an element of its case, the ownership of property damaged or destroyed. Section 1.07(24)[3] of the Texas Penal Code defines "owner" as a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor. Therefore, depending on the facts, the State can prove ownership in any of the three ways provided in section 1.07(24).

In this case, the original indictment read, in relevant part, as follows:

> ...did then and there intentionally and knowingly damage and destroy tangible property to-wit: a trailer, without the effective consent of Mildred Hewitt Krupa, the owner of said property...

Prior to trial, Krupa filed two motions to quash the indictment for failure of the indictment to: (1) specify on which type of ownership defined in section 1.07(24) the State intended to rely at trial; and (2) specify by what manner of means Krupa did damage

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[1] TEX. PENAL CODE ANN. ¶ 28.05 (Vernon 1974).

[2] TEX. PENAL CODE ANN. ¶ 28.03 (Vernon Supp. 1987).

[3] TEX. PENAL CODE ANN. ¶ 1.07(24) (Vernon 1974).

and destroy the property in question. The trial court granted both motions but allowed the State to amend the indictment, rather than re-indict.[4]

The State's motion to amend the indictment reads, in relevant part, as follows:

> The amendment would change the indictment by inserting after 'destroy' and before 'tangible' the following: "by putting a flammable liquid on said trailer and igniting said flammable liquid by a means unknown." And would further amend said indictment by inserting after property and before 'and' in the third line from the bottom the following: "by virtue of having a greater right to possession of said property than the defendant."
>
> After the amendments the indictment should read;
>
> IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:
>
> The Grand Jurors, duly selected, organized and impaneled as such in and for the County of Grayson, State of Texas, at the JANUARY Term, A.D. 1985, of the District Court in and for the 59th Judicial District of texas and for said County upon their oaths in said Court at said Term present that on or about the 25th day of January, A.D. 1985, and anterior to the presentment of this indictment, in the County of Grayson and State of Texas, GEORGE KRUPA hereinafter called "Defendant" did then and there intentionally damage and destroy, by putting a flammable liquid on said trailer and igniting said flammable liquid by a means unknown, tangible property, to-wit: a trailer, without the effective consent of Mildred Hewitt Krupa, the owner of said property *by virtue of having a greater right to possession of said property than the defendant*, and did thereby cause pecuniary loss in the amount of more than $20,000.00 to the said Mildred Hewitt Krupa, against the peace and dignity of the State.

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[4] TEX. CODE CRIM PROC. ANN. art. 28.01(a) (Vernon Supp. 1988).

> WHEREFORE PREMISES CONSIDERED, the State prays the Court to grant the above motion. [Emphasis added.]

The Court's order reads, in relevant part, as follows:

> IT IS, THEREFORE, CONSIDERED, ORDERED, AND ADJUDGED by the Court that the above action prayed for be and the same is hereby granted.

We first recognize that under the authority of *Thomas v. State*, 621 S.W.2d 158, 161 (Tex. Crim. App. 1981), the language describing the particular type of ownership by which the complainant owned the property was not required. In *Thomas*, the court held that when a term such as "owner" is defined in the statute, it need not be further alleged in the indictment, even in the face of a motion to quash. Therefore, the words "by virtue of having a greater right of possession of said property than defendant" in the amended indictment were unnecessary words.

As a general rule, unnecessary words or allegations in an indictment may be rejected as surplussage if they are not descriptive of that which is legally essential to the validity of the indictment. But where the unnecessary matter is descriptive of that which is legally essential to charge a crime, it must be proven as alleged even though needlessly stated. *Huffman v. State*, 726 S.W.2d 155, 157 (Tex. Crim. App. 1987); *Blevins v. State*, 672 S.W.2d 828, 830 (Tex. App. — Corpus Christi 1984, no pet.).

Under the amended indictment, as well as under section 28.03 of the Texas Penal Code, an essential element of the State's case was that Mildred Hewitt Krupa was the "Owner of the property. By alleging her ownership "by virtue of having a greater right to possession of said property than the defendant," the State obligated itself to prove those facts because they are "descriptive of that which is legally essential to charge a crime of criminal mischief." *Huffman.* 726 S.W.2d at 157; *Blevins.* 672 S.W.2d at 830.

By relying solely on section 28.05 of the Texas Penal Code, the State has failed to address the essence of Krupa's complaint. As we understand Krupa's complaint, he is not arguing that his

interest in the property excused or justified actions that, in the absence of such an interest, would establish criminal mischief. Clearly, section 28.05 forecloses that defense. Instead, we understand Krupa to argue that the element of "ownership" is an essential element of the State's case and, because the State alleged in the indictment that the complainant's ownership was "by virtue of [her] having a greater right of possession," those facts were "descriptive of that which is legally essential" to charge an offense of criminal mischief; therefore, the State must prove those facts. We agree.

Section 28.05, on which the State relies, does not relieve the State of its burden of proof of each essential element of the offense beyond a reasonable doubt. By choosing to allege "greater right of possession" as descriptive of "owner," an essential element of its case, the State obligated itself to prove those facts, i.e., that complainant had a *greater* right of possession to the property than Krupa. Consequently, Krupa's possessory interest, if any, in the damaged trailer, becomes relevant to this inquiry. Under the unique amended indictment and facts of this case, we hold that section 28.05 is inapplicable.

Relevant to this inquiry, we must now focus on whether the trial court erred in its refusal to submit Krupa's requested charge as to homestead law. While it is true that a defendant is entitled to an instruction on any defensive theory raised by the evidence, the denial of a defendant's requested instruction is not error where the requested instruction is an affirmative submission of a defensive issue which merely denies the existence of an essential element of the State's case. *Green v. State*, 566 S.W.2d 578, 584 (Tex. Crim. App. 1978).

This case is not a case in which a defendant admits to having committed the culpable conduct charged, but asserts by an affirmative defense that he should be found not guilty because his action was somehow justified or excused. In that circumstance, the defendant would be entitled to a jury charge so instructing the jury as to the applicable law in order to allow the jury, even though it finds the State has proven every element of the offense, to find the

defendant not guilty. *See Sanders v. State,* 707 S.W.2d 78, 81 (Tex. Crim. App. 1986).

In the present case, proof of ownership was an essential element of the State's case. Krupa's requested instruction would have been an affirmative submission of a defensive issue that merely denied the existence of that essential element of ownership. Further, the trial court charged the jury that unless they found from the evidence beyond a reasonable doubt that the trailer was damaged or destroyed without "any consent of any kind from Mildred Hewitt Krupa, the owner, whose ownership is by virtue of having a greater right to possession of said property than defendant," or if they had a reasonable doubt thereof, they were to acquit Krupa. This charge was, therefore, sufficient to protect Krupa's right to require the State to prove each element of its case. Consequently, there was no error in the trial court's refusal to submit the requested charge. We overrule Krupa's first point of error.

In his second point of error, Krupa argues that the trial court erred in failing to grant his motion for a directed verdict because the evidence was insufficient to show that complainant had a greater right to possession of the damaged property than he did.

This point of error, as the first, must be approached in light of the fact that the State, by its amended indictment, undertook proof of ownership by evidence that complainant had a greater right to possession of the damaged property than Krupa.

As explained under the first point of error, we disagree with the State's contention that section 28.05 of the Texas Penal Code disposes of this case. However, we hold it was not error for the trial court to overrule Krupa's motion for a directed verdict because there was sufficient evidence from which the jury could reasonably infer that the complainant had a greater right of possession to the property than did Krupa and, therefore, was the owner of the trailer as alleged in the indictment.

Our concern here is the meaning of "greater right of possession" as used in section 1.07(24) of the Texas Penal Code. The evidence in this case indicates that the trailer was the separate property of the complainant. The evidence further indicates that

Krupa made a specific, unqualified[5] threat to burn the trailer. This threat was not made simultaneously with the actual burning, but was made some time prior to the burning. We hold that evidence of such a threat gave the jury sufficient evidence from which to reasonably deduce, within the meaning of section 1.07(24) of the Texas Penal Code, that at the moment in time when Krupa decided to burn the trailer, he forfeited whatever possessory interest he might have had in the property. *Cf. Freeman v. State.* 707 S.W.2d 597, 606 (Tex. Crim. App. 1986). The evidence established that complainant had a possessory interest in the property. However, once the evidence established that Krupa forfeited his possessory interest, the evidence was sufficient to support the jury's conclusion that complainant had a "greater right of possession" to the property than Krupa. The evidence being sufficient to prove complainant was the owner by virtue of having a greater right to possession of the property, we overrule Krupa's second point of error.

Krupa argues, in his third point of error, that the trial court erred in charging the jury that they could return a conviction based upon an affirmative finding of a lesser culpable mental state than alleged in the State's indictment. The original indictment in this case charged the culpable mental states of "intentionally and knowingly." In response to two motions to quash, the State filed a motion to amend the indictment. The motion requested that the trial court amend the indictment by specifying which type of ownership defined in section 1.07(24) the State intended to rely on at trial, and by specifying by what manner or means Krupa did damage and destroy the property in question. The motion to amend the indictment was in response to, and addressed the matters raised in, the motions to quash. Neither the motions to quash nor the amendment language of the motion to amend addressed the culpable mental states of the accused.

The motion did contain a section which began: "[A]fter the amendments the indictment should read . . . ." The suggested

[5] See supra p.2. In Texas, the longstanding rule has been that a threat, though conditional, is unqualified if the accused has no right to require the condition. *Dole v. State,* 661 S.W.2d 726, 728 (Tex. Crim. App. 1983). Here, Krupa had no right to demand that complainant refrain from calling the Grayson County Sheriff.

language in this part of the motion tracks the language of the original indictment except that the culpable mental state is described as "intentionally" rather than "intentionally and knowingly." We conclude that the language deleting a portion of the culpable mental state was not properly a part of the motion to amend the indictment but was, rather, merely surplussage. We further conclude that the original indictment language remains in effect except for that portion of it specifically altered by the court's ruling upon the motion to amend. In that we hold that the indictment in this case alleged the culpable mental states of "intentionally and knowingly" we are not presented with any error in the charge of the court. We overrule Krupa's third point of error.

In his fourth point of error, Krupa argues that the trial court erred in failing to submit his requested instruction on involuntary intoxication. The trial court gave the following instruction to the jury concerning involuntary intoxication:

> Now if you find from the evidence beyond a reasonable doubt that at the time and place and on the occasion in question, the defendant George Krupa, did then and there unlawfully, intentionally and knowingly damage and destroy tangible property of Mildred Krupa, the owner, to-wit: a trailer, without the effective consent of any kind from Mildred Hewitt Krupa, as alleged in the indictment, but you further find from the evidence, or you have a reasonable doubt thereof, that at such time the defendant was suffering a disturbance of mental or physical capacity resulting from the introduction of an intoxicating substance into his body, and that he had exercised no independent judgment or volition in taking the intoxicant, and that as a result of his intoxication he did not know that his conduct was wrong, then you will find him "not guilty".

Involuntary intoxication is a defense to criminal culpability when it is shown that:

(1) The accused has exercised no independent judgment or volition in taking the intoxicant; and

(2) As a result of his intoxication the accused did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated.

Torres v. State. 585 S.W.2d 746, 749 (Tex. Crim. App. 1979). The instruction given by the court correctly apprised the jury of the law and adequately protected Krupa's rights.

Also under the fourth point of error, Krupa argues that the trial court erred in instructing the jury that involuntary intoxication did not constitute a defense to criminal culpability. Krupa's complaint clearly goes to the court's charge on *voluntary* intoxication. The court charged as follows:

> You are instructed that under our law neither intoxication nor temporary insanity of mind caused by intoxication shall constitute a defense to the commission of crime. Evidence of temporary insanity caused by intoxication should be considered in mitigation of the penalty attached to the offense.
>
> By the term "intoxication" as used herein is meant disturbance of mental or physical capacity resulting from the introduction of any substance into the body.
>
> By the term "insanity" as used herein, is meant that as a result of intoxication the defendant did not know that his conduct was wrong.
>
> Now if you find from the evidence that the defendant, George Krupa, was temporarily insane as defined in this charge and such temporary insanity was produced by *voluntary intoxication,* then you may take such temporary insanity into consideration in mitigation of the penalty. [Emphasis supplied.]

The crux of Krupa's complaint is that because the first sentence of the instruction refers to intoxication, the jury could assume that the instruction applied to both voluntary and involuntary intoxication. When the instruction is read in its entirety and in context with the rest of the charge it is clear that this instruction refers only to voluntary intoxication. Krupa's rights were ade-

quately protected as to the law concerning both voluntary and involuntary intoxication. We overrule Krupa's final point of error.

The judgment of the trial court is affirmed.

/s/Sue Lagarde
JUSTICE

PUBLISH
TEX. R. APP. P. 90
87-0419.F/me

Appendix B

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

GEORGE KRUPA, APPELLANT,
v. NO. 05-87-00419-CR
THE STATE OF TEXAS,
APPELLEE.

ORDER

Appellant's motion to extend the time for filing a motion for rehearing is GRANTED and the motion for rehearing shall be filed by April 28, 1988.

April 15, 1988.

/s/
SUE LAGARDE
JUSTICE

87-00419.01

Appendix C

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

GEORGE KRUPA,
APPELLANT,
V. NO. 05-87-00419-CR
THE STATE OF TEXAS,
APPELLEE.

ORDER

It is ORDERED that the motion for rehearing filed by appellant, George Krupa, is OVERRULED.

May 24, 1988.

/s/_____
SUE LAGARDE
JUSTICE

Appendix D

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

GEORGE KRUPA

VS. CAUSE NUMBER 05-87-00419-CR

STATE OF TEXAS

On this 27th day of June, 1988, came on to be considered the motion of the appellant's counsel for an extension of time in which to file the Appellant's Petition for Discretionary Review.

AND SUCH MOTION is hereby granted, the time for filing the said item has been extended to the 24th day of June, 1988.

IT IS SO ORDERED

PER CURIAM

Special Note: The Petition for Discretionary Review MUST be filed with the Court of Appeals.

A TRUE COPY ATTEST:

Thomas Lowe, Clerk
Court of Criminal Appeals

By:/s/Louise Hudson
Deputy Clerk

Appendix E

GEORGE KRUPA, Appellant	Petition for Discretionary Review from the FIFTH
No. 757-88 v.	Court of Appeals
THE STATE OF TEXAS, Appellee	[GRAYSON County]

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted by a jury for criminal mischief and assessed 5 years imprisonment. The conviction was affirmed. Krupa v. State, 750 S.W.2d 258 (Tex.App.-Dallas 1988). Appellant filed a petition for Discretionary review raising three grounds for review.

We have considered the issues raised and find that the Court of Appeals reached the correct result. As is True in every case where this Court refuses a petition for discretionary review, this refusal does not constitute endorsement or adoption of the reasoning employed by the Court of Appeals. See Sheffield v. State, 650 S.W.2d 813 (Tex.Cr.App. 1983).

With this understanding, appellant's petition for discretionary review is refused.

PER CURIAM

Delivered: April 26, 1989

Publish

J. Teague would grant, and J. Miller would grant grounds 2 and 3.

Appendix F

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

JUNE 7, 1989
COA#: 05-87-00419-CR

RE: Case No. 0757-88
STYLE: Krupa, George

On this day the Appellant's Motion for Rehearing was denied.

JUDGE TEAGUE WOULD GRANT

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:

David K. Wilson
421 N. Crockett
Sherman, TX 75090
JUN 12 1989

Appendix G

No. 33922

THE STATE OF TEXAS VS. GEORGE KRUPA	IN THE 59TH JUDICIAL DISTRICT COURT GRAYSON COUNTY, TEXAS

JUDGMENT

BE IT REMEMBERED that on the 16th of January, 1987, this cause being called for trial and the State appeared by her County Attorney and the Defendant, GEORGE KRUPA, appeared in person, in open court, his counsel also being present, and the said Defendant, GEORGE KRUPA, having been duly arraigned, and having pleaded not guilty to the indictment herein, both parties announced ready for trial, and thereupon a jury, to-wit: Bettie Mathis and eleven (11) others, was duly selected, impaneled and sworn, who having heard the indictment read and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the court and is here now entered upon the minutes of the court, to-wit:

"We, the Jury, find the Defendant, GEORGE KRUPA, guilty of CRIMINAL MISCHIEF as charged in the indictment.

/s/Bettie Mathis
FOREMAN

THEREUPON, the Defendant, GEORGE KRUPA, elected to have his punishment fixed by the Court, and the Court, having heard evidence on the question of punishment fixed his punishment at five (5) years confinement in the Texas Department of Corrections, probated five years.

IT IS THEREFORE CONSIDERED and adjudged by the Court that the Defendant, GEORGE KRUPA, is guilty of the offense of CRIMINAL MISCHIEF, as charged in the indictment, as found by the jury, and that his punishment has been set by the Court at confinement in the Texas Department of Corrections for five (5) years, and that the said Defendant remain in custody until Probation Orders are issued by this Court. SIGNED AND ENTERED this 17 day of February, 1987.

/s/Joe M. Joiner
JUDGE PRESIDING